No. 15323

United States
Court of Appeals
For the Ninth Circuit

FLOYD SMITH,

Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,

Appellees.

Appellant's Reply Brief

Appeal from the United States District Court for the District of Oregon.

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SUMMARY OF ARGUMENT

Plaintiff* cannot be held guilty of contributory negligence as a matter of law nor is any doctrine of assumption of risk applicable.

Not only did plaintiff present sufficient evidence to make it a jury question as to whether or not his vehicle was disabled, but there was likewise sufficient evidence to establish that he was properly parked in compliance with the affirmative portions of the cited statute whether disabled or not.

For clarity, appellant will adopt the designation of plaintiff-defendant used by appelles in their Answering Brief in this Reply Brief.

As to assumption of risk, this doctrine, in common parlance, had its origin in the master-servant relationship, was later extended to sports activities and in the case of **Hunt v. Portland Baseball Club,** 62 Or. Adv. Sheets 805, 296 P. 2d 495, was extended to the spectator at a sports game.

Plaintiff will not assume the burden of an academic debate upon whether or not such a doctrine of "assumption of risk" should be further extended; suffice it to say that its extension to the case at bar would result in a drastic abrogation of a substantial portion of the existing applicable law.

Assuming a vehicle otherwise "parked" in violation of the statute but legitimately disabled, the present rule is that it is a proper use of the highway for the driver to halt his car and work about it to remedy the defect subject to a jury's determination as to whether or not such conduct was reasonable under all the facts and circumstances. To impose the doctrine of "assumption of risk" in the fashion defendants suggest, would be to declare the rationale that if a vehicle is parked in violation of the statute, even though disabled, the danger meant to be prevented by the statute is assumed by the driver and bars his recovery in every instance, doing away with the present jury question as to contributory negligence.

SUMMARY OF ARGUMENT

Sufficient evidence was submitted from which the jury could determine that defendants were negligent.

In their argument upon this point defendants overlook those portions of the testimony at variance with that quoted. While the defendant Buck testified that the distance between plaintiff's vehicle and the vehicle opposite it was 15 to 16 feet, the plaintiff testified that this distance was 30 to 40 feet and the witness Moore, 25 to 30 feet. How close the defendants came to plaintiff in passing him is determined by the defendant's own testimony that five or six feet was all the distance the trailer slid in order to strike plaintiff.

Plaintiff cited 15 feet in his Opening Brief to show how narrow and dangerous the aspect of the passage had to appear in defendant's own eyes. His negligence is twice as apparent and twice as reprehensible if he had from 25 to 30 feet or even 40 feet for his passage and nonetheless undertook to pass within five feet of plaintiff.

The situation was not created by plaintiff as defendants contend. Plaintiff was first upon the scene. When his vehicle came to halt there was no one opposite him and the roadway was unobstructed and clear for a distance far in excess of 16 feet. Defendant's contention that "the more plaintiff attempts to show

that the situation was so dangerous that defendant was negligent in trying to drive past, the more he demonstrates his own foolhardiness . . ." is in fact applicable directly in reverse. The obvious dangers of which both parties now speak are those that existed when the defendants came upon the scene but did not exist when plaintiff's vehicle came to a halt. It was after plaintiff halted that a vehicle was driven to the wrong side of the road to be halted precisely opposite him and that a truck and trailer unit attempted to negotiate the passage between. Defendants, however, approached the scene with this second car in position and attempted to negotiate the passage with such a compound vehicle and in the face of the steep bank down towards plaintiff, passing so close to plaintiff when they began their attempt as to leave no room for the obvious probabality that the free swinging trailer without its own motive power would obey the law of gravity and slide down into plaintiff.

ARGUMENT

A. **Plaintiff was not guilty of contributory negligence and the theory of assumption of risk is not applicable.**

(1) **Plaintiff was not guilty of contributory negligence.**

The proper consideration of the applicability of O. R.

S. 483.320 requires a consideration of the scene at the time plaintiff's vehicle came to a halt.

Plaintiff was the first to arrive and there were no other vehicles present when his vehicle came to a halt upon his own side of the road within 24 to 36 inches from a steel guard rail that prevented him from removing it further. It was after he was in this position that a vehicle halted opposite him (Tr. of R. p. 22). If there was a minimum of 15 to 16 feet between plaintiff's vehicle and this latter vehicle after it had halted, there was an unobstructed roadway opposite the defendant in excess of 20 feet prior thereto.

The witness Moore likewise brought his vehicle to a halt after plaintiff had halted (Tr. of R. p. 29). He parked behind plaintiff, but before he did so plaintiff's vehicle was visible for a distance of 150 to 200 yards in the direction from which the defendants approached (Tr. of R. p. 30).

The cited statute can be divided into three parts for our purpose. The first is the injunction that no vehicle shall be parked upon the paved or main traveled portion of any highway when it is practicable to park it off such portion of the highway. The second part turns to the instances when it will not be practicable and commands that in no event shall there be less than 16 feet of unobstructed width of the main traveled portion of the highway left open for passageway and

that the vehicle shall be in clear view for a distance of 200 feet in either direction. The third part is the proviso that neither of these injunctions shall apply in the instance of a disabled vehicle which, under the decisions, is deemed to be using the highway for a proper purpose and not to be "parked."

There is sufficient evidence to show plaintiff's obedience to the affirmative provisos of this statute, setting aside for the moment the exception. Plaintiff brought his vehicle to a halt with 24 inches of a steel guard rail on his own side of the road on a snow-packed highway for the purpose of putting on chains. There was a clear and unobstructed roadway opposite him in excess of 16 feet and his vehicle was clearly visible for a distance in excess of that required.

Since the plaintiff was properly "parked," if "parked" and not disabled, the fact that there was an additional width present on his side of the road at some point to the west and one across the road from where he halted, is irrelevant. It is irrelevant, however, for an additional reason. When the plaintiff brought his vehicle to a halt, there being no other vehicles present, the width of the road was constant; the extra widths on either side of the road, but not opposite each other, compensating one for the other. It made no difference at that time where plaintiff parked in so far as his obedience of that statute was concerned.

The suggestion of defendants that plaintiff should have crossed over to the wrong side of the road to halt his vehicle is likewise irrelevant. Again, not merely because plaintiff was properly "parked," but because, as might be suspected, Oregon law, O. R. S. 483.302, provides that it is the duty of a driver to drive upon the right half of the highway. In addition O. R. S. 483.338 specifically provides that on mountain highways, a driver shall hold his vehicle under control and as near to the right hand side of the highway as reasonably possible.

The witness Moore said of his observation of the vehicle that came to a halt opposite plaintiff as follows: (Tr. of R. p. 29)

> "I seen there was a woman stuck on the left hand side of the road facing the wrong direction, going the same direction we were going, on the wrong side of the road. She was stuck."

No reason existed why plaintiff, first upon the scene and in imminent danger of losing control of his vehicle altogether for lack of traction, should suddenly conceive it his duty to attempt to cross over to the "wrong side of the road" in clear violation of O. R. S. 483.302 and O. R. S. 483.338 to bring it to a halt.

So much for affirmative compliance with O. R. S. 483.302.

We turn now to the evidence establishing that he

was excused from compliance by virtue of his vehicle being "disabled."

A vehicle is defined as disabled "when it cannot be safely moved to a place of safety under its own power." **Shelton v. Lowell,** 196 Or. 430, 249 P. 2nd 958. A cursory examination of defendant's authorities reveals the disability of the vehicle and the effect of the statute is a question of fact for the jury. Each of the cases cited by defendants in which a disability of the vehicle was in issue was submitted to the jury, and some under facts far less drastic than those in the case at bar.

The defendants acknowledge upon pages 10 and 11 of their brief, that plaintiff's vehicle had lost traction, that his wheels were spinning, and that he could not have driven further and maintained control of his car. Their contention seems to be that something can be made of the fact that it could still be moved, with or without control. The defendant sums up upon page 11:

> "It appears from this testimony as if plaintiff's car was still able to move, although he would not have had control of it if he had attempted to proceed further."

Compare this with the factual situations in the cases cited by defendant in each of which the subject was held a jury question. In **Dare v. Boss,** 111 Or. 190, 224. P. 646, plaintiff had a flat tire. It is common knowledge

that a vehicle with a flat tire can be moved on the tire and then on the rim.

In **Martin v. Oregon Stages,** 129 Or. 435, 277 P. 291, the plaintiff's fog light was loose and waving to and fro. The addition of a fog light is admittedly an aid, but hardly a necessity, in the driving of a vehicle.

In **Holman v. Uglow,** 137 Or. 358, 3 P. 2d 120, plaintiff's car was out of gas. No issue was made of the negligence of one who permits his vehicle to get in that position.

In **Morris v. Fitzwater,** 187 Or. 191, 210 P. 2nd 104, plaintiff's lights went out. Admittedly a car with its lights out can still be moved if defendant's standard is applicable.

At best, therefore, if plaintiff did not "park" his vehicle in accordance with the statute when it came to a halt, it would be question for the jury as to whether or not his vehicle was disabled under the exception of the statute.

(2) **Plaintiff was not negligent in attempting to remedy the disability of his vehicle nor in the fashion in which he did so.**

Defendants next point that the plaintiff placed himhelf in a dangerous position on the highway and failed to keep a lookout. They raise this as if it were separate

and distinct from a charge of contributory negligence for halting his vehicle where he did.

It is no such separate point. It will be noted that in each of the cases cited by the defendant and heretofore discussed, none are actions for damages to the vehicle but each is for personal injuries sustained when plaintiff was attending his disabled vehicle or attempting to make repair. The occurence of the disability makes it a proper use of the highway for the driver to then and there attempt to remedy the same. His attempting to do so is not in itself contributory negligence. It becomes a question of fact for the jury to determine whether or not he used due care in this process under all of the facts and circumstances.

In **Dare v. Boss,** supra, at page 195 the Court describes the situation as follows:

> "The plaintiff's testimony is to the effect that one of the front tires of his car was so flattened as a result of the puncture that it would have been dangerous for him to have driven further with it in that condition and that he stopped his car as far off the road as appeared same to him;"

Upon page 197 the Court cited the statute then in effect which read as follows:

> "No vehicle shall be parked upon the main-traveled portion of the highways of this state; provided, that this shall not apply to any vehicle so disabled as to prohibit the moving of the same."

The Court says of this statute upon page 198:

> "The 'rule of reason' applies here, and if it should have appeared to the jury that he could have moved the car safely he would have been guilty of contributory negligence in failing to do so, but unless the testimony is uncontradicted the court should not hold that stopping to repair a temoprary disability is contributory negligence as a matter of law . . ."

In **Martin v. Oregon Stages,** supra, the Court, speaking of the same statutory language as set forth in **Dare v. Boss,** states as follows upon page 441:

> "The proviso cannot be applied in all cases literally. The words 'so disabled as to prohibit" does not necessarily indicate that the vehicle could not be moved but that it would be unsafe to move in under the conditions existing at the place and time . . ."

Upon page 443 the Court states:

> "From these authorities we hold that this court is committed to the rule that the jury is the judge of the question as to whether or not the truck driven by plaintiff was actually parked in the technical sense of that word as used in our statute. If the truck was standing partially on the traveled portion of the highway because of a necessity for some temporary repair and the driver was engaged in making the necessary repair, then plaintiff was not guilty of contributory negligence in that regard . . ."

Upon page 444:

> "The conduct of the plaintiff just before and at

> the time of the accident must be judged by the appearances and conditions at the time. The fact that plaintiff could have driven his truck entirely off the traveled portion of the highway a few feet farther along, if that is a fact, does not necessarily require the court to hold that plaintiff was guilty of contributory negligence by stopping where he did. If he did what a reasonably prudent man would have done under the circumstances, we cannot say as a matter of law that he is guilty of contributory negligence."

In **Holman v. Uglow,** supra, plaintiff was injured while pushing a vehicle disabled by its being out of gas. At the place where the vehicle ran out of gas there was a six foot wide, but ungraveled, shoulder, but there was a heavy rain and plaintiff and his companions feared that the vehicle would sink into the mud if pushed off the road at that place. They were therefore engaged in pushing the automobile to a spot approximately 450 feet ahead where it could be parked on a graveled area when defendant struck them. Upon page 365 the Court states:

> "An automobilist who exercises due care may in an emergency use a portion of the roadway for making necessary inspections of his car, raising the top, making needed repairs, or for the performance of other acts rendered necessary by the inability of his car to proceed. Such actions, being incidental to travel, are regarded as a proper use of the highway: **Martin v. Oregon Stages,** 129 Or. 435 (277 P. 291); **Dare v. Boss,** 111 Or. 190 (224

P. 646); **Deitchler v. Ball,** 99 Wash. 483 (170 P. 123); **Schacht v. Quick,** 178 Wis. 330 (190 N.W. 87, 25 A.L.R. 130); 42 C.J. title Motor Vehicles, p. 1041, Sec. 791. Hence, the conduct of the deceased in pushing the automobile along the highway when its supply of fuel had become exhausted could properly be regarded as a legitimate use of the road."

"The Federal Supreme Court, and also this court, recently reiterated the rule that when fair-minded men can honestly disagree upon the question whether a given set of facts reveals negligence or the exercise of due care, the question is not one of law but of fact for settlement by the jury: **Gunning v. Cooley,** 281 U.S. 90 (74 L. Ed. 720, 50 Sup. Ct. 231); and **Ford v. Schall,** 114 Or. 688 (236 P. 745)."

Upon page 366:

"Coming now to the second subdivision of the contention, the rule which governed the three young men in their conduct while shoving the car ahead was the much reiterated, platitudinous rule that they were bound to employ reasonable care. This simple formula is easier of statement than of application, but generally in instances of this kind the application of the rule is for the jury and not for the court."

In **Morris v. Fitzwater,** supra, the plaintiff and her husband were driving along the highway when without warning her lights went out. She steered the car over to the right side of the highway and brought it

to a stop. Plaintiff remained in the driver's seat while the husband got out to investigate the reason for the lights having failed. At this point defendant's vehicle collided into the plaintiff's vehicle from the rear. The question of plaintiff's conduct was one for the jury.

The "analogous" case of **Borgert v. Spurling,** 191 Or. 344, 230 P. 2d 183, cited by defendants—in fact supports plaintiff's position.

The accident involved three automobiles. The first was the Potterf car in which plaintiff was a passenger and which ran out of gas and was pulled off the highway at a point where the shoulder was approximately three and a half feet wide. The second was the Fox vehicle which parked along side the Potterf vehicle but on the highway and faced in the wrong direction. With the two vehicles in this position gasoline was being siphoned from the Fox vehicle into a hubcap for the purpose of pouring the same into the Potterf vehicle. At this point the third vehicle, that of the defendant Spurling, came upon the scene and struck and injured plaintiff. The plaintiff brought action against both Spurling and Fox, alleging as to Fox that he violated the parking statute and that this was a proximate cause of his injury. The Fox car was clearly parked in violation of the statute and the Court held that the plaintiff concurred in this negligence as a means of getting the Potterf car, in which he was a

passenger, on its way again. The Court clearly distinguishes the unusual situation.

Upon page 351 the Court states:

"Defendant Spurling charged that the Potterf car was parked in violation of these provisions. But the car was disabled, and there is evidence that it was moved as far off the pavement as possible and that, before the Fox car was parked alongside it, more than 16 feet of unobstructed highway was left for the passage of other vehicles. In these circumstances, under our decisions, the question whether the car was parked in violation of the statute was a question for the jury. **Morris v. Fitzwater,** 187 Or. 191, 197, 210 P. 2d 104; **Hornshuh v. Alldredge,** 149 Or. 419, 424, 41 P. 2d 423; **Holman v. Uglow,** 137 Or. 358, 366, 3 P. 2d 120; **Martin v. Oregon Motor Stages, Inc.,** 129 Or. 435, 441, 277 P. 291; **Dare v. Boss,** 111 Or. 190, 197, 224 P. 646. Had the Fox car never come upon the scene, and had the plaintiff been injured while engaged about the rear of the Potterf car in making some necessary repair or filling the gasoline tank, we would have had an entirely different case than the one actually presented, a case more like **Martin v. Oregon States, Inc.,** and **Holman v. Uglow, in which the question of contributory negligence was held to be for the jury.** And see Annotation, 61 A.L.R. 1164."

"Alvin Fox clearly violated the parking statute. His car was not disabled, and, Good Samaritan though he was, his generous impulses afforded him no exemption from the statute's command. As previously stated, the two cars completely

blocked the passage of vehicular traffic on the east half of the road, and, even accepting plaintiff's measurements, less than 16 feet of unobstructed highway was left opposite the Fox car . . ."

"The evidence in some respects is too indefinite and uncertain to permit us to say that the plaintiff had or exercised any such control over the movement of the Fox car, that he could be held legally responsible for the illegal and negligent act of Alvin Fox or for the dangerous situation created by the juxtaposition of the two cars. But the plaintiff knew, or should have known, of the dangerous situation, and he accepted it as the means through which the Potterf car might be gotten on its way again. And it is conclusively established for the purposes of this case, not only that Alvin Fox, as alleged in the complaint, parked his car 'in the center of said county road' but that this was an act of negligence which was a proximate cause of plaintiff's injury. As stated in IV Wigmore, Evidence (3d ed.) 45, Sec. 1064, 'The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admission . . . but judicial admissions . . .; i.e. they are not means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues.' "

"In these circumstances, it might well be urged that the plaintiff was guilty of negligence in undertaking at all to busy himself about the rear of the Potterf car." (Emphasis added).

There is no case in which the Oregon Supreme Court has held that as a matter of law one whose vehicle has

been disabled on the highway is guilty of contributory negligence in attempting to remedy that defect while vehicle is in that position. To the contrary, in each instance that Court has held that both whether or not the vehicle was disabled and the reasonableness of the conduct of the plaintiff in attempting to remedy the defect, are questions of fact for the jury.

This embraces defendants charge that plaintiff failed to keep a lookout. What amount of lookout a reasonably prudent person could have or would have maintained under all the facts and circumstances including the task to be accomplished, the obvious visibility of his automobile, that he could assume others would obey the law and use due care, etc., is to be determined by the jury.

(3) **A separate theory of "assumption of risk" is not applicable in this cause.**

Whatever conduct upon the part of plaintiff the defendants are urging under this separate theory of "assumption of risk" is well embraced within their plea of contributory negligence.

It is hornbrook law that the doctrine of assumption of risk, as the phrase is used by the authorities to designate a specific rule of law, is applied to occupations and activities that of common knowledge involve inherent danger and in which an intelligent choice to engage in the same necessarily includes a conscious

acceptance of those risks for the benefits or pleasures to be gained. (65 C.J.S. Negligence, Sec. 17, p. 848). As applied under the common law to the servant who accepts hazardous employment or to the injured football player who engages in vigorous play or to the spectator of a baseball game who has reason to expect foul balls, the doctrine so described is in accord with human experience.

But to say that one who is changing a flat tire and is injured by the outright negligence of another is absolutely barred from recovery because of his "assumption of the risk" of being out of his car and in that awkward position is as sensible as saying that one who drives an automobile and is injured in an accident clearly the other driver's fault is absolutely barred from recovery by his "assumption of the risk" of driving.

Specifically as to the case at bar, the Oregon Supreme Court has held under similar fact situations that the issue of contributory negligence is for the jury to determine. It has **not** held that there can be no such issue because the driver assumes the risk of whatever occurs to him when he places himself upon the highway for the purpose of attempting to solve the disability of his vehicle.

B. **There was substantial evidence that defendant was guilty of negligence.**

Since this is the subject of appellant's opening brief, appellant will not belabor the point here.

Admittedly, mere skidding alone is no indication of negligence, but mere skidding alone—indeed "skiding"—is not the charge against defendants in this cause.

The fact is that defendant's trailer did not skid—it **slid.** The icy condition of the road was not a latent factor that occasioned the chance misfortune of an unexplained skid of an automobile or truck.

This is a case of deliberate choice to travel at right angles across a steeply inclined plane, obviously slippery enough to disable other vehicles, with a jointed vehicle, the second half of which, being without its own motive power was free to slide down the incline unless the first half was drawn at such speed and in such direction as to make the second half follow dead in its tracks. The defendants simply failed in the task they deliberately undertook, to maintain control of the trailer so that it wouldn't slide down into plaintiff. This was negligence.

It is respectfully submitted that the judgment order of the trial court should be reversed.

Respectfully submitted,

/s/ DAVID M. SPIEGEL,

Attorney for Appellant.